

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service Commission held at its office in Jefferson City on the 7th day of February, 2018.

In the Matter of Application of The Public Funding Corporation of the City of Ozark, Missouri to Sell its Water System Located in Christian County to the City of Ozark, Missouri)
) File No. WM-2017-0342
)
)

ORDER DENYING MOTION TO DISMISS

Issue Date: February 7, 2018

Effective Date: February 7, 2018

The Public Funding Corporation of the City of Ozark (“Applicant”) filed an application¹ and an amended application² (“application”) to sell Applicant’s water system (“the system”) to the City of Ozark (“City”). The Office of the Public Counsel (“OPC”) filed the motion to dismiss³ (“motion”). The Commission received responses to the motion from the City⁴ and the Commission’s staff⁵ (“Staff”). OPC filed a reply.⁶ Staff filed a sur-reply.⁷

The application cites Section 393.190.⁸ Section 393.190 governs the sale of a water system by a water company.⁹ OPC argues that Section 393.190 does not mention the City

¹ Electronic Filing Information System (“EFIS”) No. 1 (June 19, 2017) *Application*.

² EFIS No. 3 (June 26, 2017) *First Amended Application*.

³ EFIS No. 17 (January 9, 2018) *Motion to Dismiss City of Ozark’s First Amended Application*.

⁴ EFIS No. 19 (January 18, 2018) *Entry of Appearance and City of Ozark’s Suggestions in Opposition to Office of Public Counsel’s Motion to Dismiss*.

⁵ EFIS No. 18 (January 17, 2018) *Staff’s Response in Opposition to OPC’s Motion to Dismiss*.

⁶ EFIS No. 20 (January 22, 2018) *Public Counsel’s Response to Staff’s and Applicant’s Opposition to Public Counsel’s Motion to Dismiss*.

⁷ EFIS No. 21 (February 1, 2018) *Staff’s Further Response in Opposition to OPC’s Motion to Dismiss*.

⁸ Sections are in the 2016 Revised Statutes of Missouri. Any emphasis is the Commission’s.

⁹ Section 393.190’s full text appears in the appendix to this order.

as a potential buyer, and Sections 91.090 and 91.120 govern instead, requiring a ballot issue. If the Commission cannot grant the relief sought in the application, the Commission can only dismiss the application.¹⁰

OPC has the burden of proving its motion by a preponderance of the evidence.¹¹

I. Plain and Unambiguous Language

First, the Commission looks to the plain language of Section 393.190, which the Commission finds to be unambiguous as follows.

a. The Statute

Section 393.190 addresses [A] the sale of a system and [B] the merger of a system.

Section 393.190 provides that, in the absence of Commission authorization:

1. No . . . water corporation . . . shall hereafter [A] sell . . . the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor [B] by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, [C] with any other corporation, person or public utility [.]

Staff and the City argue that clause C modifies clause B only, and not clause A, so Section 393.190 applies to any sale of the system to any buyer, including Applicant's sale to the City. Staff and the City are correct.¹²

OPC argues that clauses A and B constitute a single list of transactions subject to clause C, which specifies transactions with only certain entities,¹³ none of which describes

¹⁰ *Oberreiter v. Fullbright Trucking*, 24 S.W.3d 727, 729 (Mo. App., E.D. 2000) (citations omitted).

¹¹ *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003) (citations omitted).

¹² The Court of Appeals has applied the statute to a purchase by a city, but the court's opinion focused on whether the Commission could compel such a sale, and did not analyze the clauses at issue. *City of O'Fallon v. Union Elec. Co.*, 462 S.W.3d 438, 443 (Mo. App. W.D., 2015).

the City.¹⁴ Section 393.190 refutes OPC's premise, that clauses A and B constitute a single list, because it makes a separate provision for the transactions in clause A:

1. . . . Nothing in this subsection contained shall be construed to prevent the **sale, assignment, lease or other disposition by** any corporation, person or public utility of a class designated in this subsection of property which is not **necessary or useful in the performance of its duties to the public**, and any **sale** of its property **by** such corporation, person or public utility shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value.

The language does not address anything in clause B. The language relates to clause A only because it addresses a "sale, assignment, lease or other disposition [,]" which is the subject of clause A only. That language makes clear that the transactions at issue in clause A are only those for a "disposition **by** any corporation, person or public utility" and not a transaction to "merge or consolidate . . . **with** any other corporation, person or public utility."

Section 393.190 also unambiguously indicates when one clause modifies another clause more remote than the last antecedent:

2. [W] **No** such corporation **shall** directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business, or proposing to operate or operating under a franchise from the same or any other municipality; [X] **neither shall** any street railroad corporation acquire the stock or bonds of any electrical corporation, **unless, [Y] in either case, [Z]** authorized so to do by the commission [.]

¹³ Person means individuals alone or associated without corporate personhood. Section 386.020(40). Corporation includes various entities, among which are entities organized to do business for profit. Section 386.020 (11). Public utility means the enterprises regulated by the Commission. Section 386.020(43).

¹⁴ The City is a fourth class city EFIS No. 3 (June 26, 2017) *First Amended Application* page 1 paragraph 2. EFIS No. 17 (January 9, 2018) *Motion to Dismiss City of Ozark's First Amended Application* page 1 paragraph 1. EFIS No. 18 (January 17, 2018) *Staff's Response in Opposition to OPC's Motion to Dismiss*, first page paragraph 1.

Clause Y applies the modifying clause Z to both clauses W and X. By contrast, nothing similar to clause Y is present in subsection 1 to apply the modifying clause C to clause A.

Therefore, clause C's specificity does not apply to clause A, and Commission authorization is needed in any sale of a system whoever the buyer is.

b. Sections 91.090 and 91.120

Equally unambiguous is the plain language of Sections 91.090 and 91.120,¹⁵ which OPC argues govern the sale of the system. Sections 91.090 authorizes the City to buy the system; and Section 91.120,¹⁶ requires the City to hold an election, but only to:

1. . . . submit the question to the voters of the city.
2. The question shall be submitted in substantially the following form:

Shall the city acquire the waterworks system and property and issue bonds therefor, which shall be a first lien on the waterworks system and property, but not a general or personal obligation of the city?

3. And if a majority of the voters of the city voting on the question shall vote "Yes", then such city shall acquire said property at the price and on the terms named in the question.

The City alleges it will issue no bonds to buy the system,¹⁷ and OPC has not disputed that allegation, so OPC has not shown that an election will occur.

And even if there were an election, only the "voters of the city" would have a voice. Voters of the city do not include the system's customers because they do not reside within the City's boundaries.¹⁸ The election affords no protection to the system's customers.

¹⁵ Section 91.090 and 91.120's full text appears in the appendix to this order.

¹⁶ Section 91.090 and 91.120's full text appears in the appendix to this order.

¹⁷ EFIS No. 19 (January 18, 2018) *Entry of Appearance and City of Ozark's Suggestions in Opposition to Office of Public Counsel's Motion to Dismiss*.

Therefore, the plain language of Sections 91.090 and 91.120 unambiguously shows that those sections do not apply to the sale of the system.

c.

Section 393.190 unambiguously assigns the Applicant's sale of the system to the Commission's authority.

II. Statutory Construction

Second and in the alternative, if the Commission found Section 393.190 ambiguous, the Commission would apply the rules of construction. The first rule of construction is to read a statute according to the legislature's intent.¹⁹ When that intent is remedial or protective, like the Public Service Commission Act, the reading should be generous in favor of the remedy.²⁰ Those principles guide the Commission toward applying Section 393.190 to the application whoever the buyer is.

Also, in case of ambiguity, the last antecedent rule applies any "[r]elative and qualifying words [to the] phrase immediately preceding and [not to] others more remote."²¹ Under that rule, clause C modifies only clause B. Clause A operates without regard to the restrictions on application of Clause C. That is, a sale of a system is subject to Section 393.190, whoever the buyer is.

¹⁸ EFIS No. 20 (January 22, 2018) *Public Counsel's Response to Staff's and Applicant's Opposition to Public Counsel's Motion to Dismiss* page 4.

¹⁹ *Trailiner Corp. v. Director of Revenue*, 783 S.W.2d 917 (Mo. banc 1990).

²⁰ *State ex rel. Webster v. Myers*, 779 S.W.2d 286, 290 (Mo. App., W.D. 1989).

²¹ *Rothschild v. State Tax Comm'n of Mo.*, 762 S.W.2d 35, 37 (Mo. banc 1988).

Therefore, the Commission concludes that, if Section 393.190 were ambiguous, the rules of construction would resolve any ambiguity in favor of the Commission's authority over the Applicant's sale of the system.

III. Public Policy

Third and finally, the plain language of Section 393.190 shows that its purpose is to regulate public utilities, as the City and Staff argue, not to regulate buyers as OPC argues.

Whenever a public utility conducts one of the specified transactions as to any necessary or useful part its system, that transaction may affect its customers, whoever the buyer is. Section 393.190 reflects that concern by bringing that transaction under the Commission's authority, whoever the buyer is. Similarly, whenever public utilities merge by any means, Section 393.190 places that transaction within the Commission's authority. The purpose of Section 393.190 is Commission oversight of public utilities. To follow OPC's reading and omit the Applicant's sale of its system from that oversight, simply because the buyer is a city, would be absurd—a reading that the Commission strives to avoid.²²

Moreover, on these facts, applying Sections 91.090 and 91.120 would only further the very ills that OPC seeks to avoid, which are that:

If the City . . . were to take over the [system, its customers] would be left with no recourse if something went wrong with their service or had some other complaint. They could not make a complaint to the PSC. They could not vote in local elections to influence the city officials. Thus, the City . . . would become an unregulated monopoly, free to set its own rates, without any recourse for the consumer. [²³]

²² *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n of State*, 399 S.W.3d 467, 480–81 (Mo. App., W.D. 2013).

²³ EFIS No. 20 (January 22, 2018) *Public Counsel's Response to Staff's and Applicant's Opposition to Public Counsel's Motion to Dismiss* page 4.

Therefore, the Commission concludes that Section 393.190 applies to the sale of the system.

THE COMMISSION ORDERS THAT:

1. The *Motion to Dismiss City of Ozark's First Amended Application* is denied.
2. This order shall be effective when issued.



BY THE COMMISSION

A handwritten signature in black ink that reads "Morris L. Woodruff".

Morris L. Woodruff
Secretary

Hall, Chm., Kenney, Rupp, Coleman,
and Silvey, CC., concur.

Jordan, Senior Regulatory Law Judge

Appendix

393.190. 1. No gas corporation, electrical corporation, water corporation or sewer corporation shall hereafter sell, assign, lease, transfer, mortgage or otherwise dispose of or encumber the whole or any part of its franchise, works or system, necessary or useful in the performance of its duties to the public, nor by any means, direct or indirect, merge or consolidate such works or system, or franchises, or any part thereof, with any other corporation, person or public utility, without having first secured from the commission an order authorizing it so to do. Every such sale, assignment, lease, transfer, mortgage, disposition, encumbrance, merger or consolidation made other than in accordance with the order of the commission authorizing same shall be void. The permission and approval of the commission to the exercise of a franchise or permit under this chapter, or the sale, assignment, lease, transfer, mortgage or other disposition or encumbrance of a franchise or permit under this section shall not be construed to revive or validate any lapsed or invalid franchise or permit, or to enlarge or add to the powers or privileges contained in the grant of any franchise or permit, or to waive any forfeiture. Any person seeking any order under this subsection authorizing the sale, assignment, lease, transfer, merger, consolidation or other disposition, direct or indirect, of any gas corporation, electrical corporation, water corporation, or sewer corporation, shall, at the time of application for any such order, file with the commission a statement, in such form, manner and detail as the commission shall require, as to what, if any, impact such sale, assignment, lease, transfer, merger, consolidation, or other disposition will have on the tax revenues of the political subdivisions in which any structures, facilities or equipment of the corporations involved in such disposition are located. The commission shall send a copy of all information obtained by it as to what, if any, impact such sale, assignment, lease, transfer, merger, consolidation or other disposition will have on the tax revenues of various political subdivisions to the county clerk of each county in which any portion of a political subdivision which will be affected by such disposition is located. Nothing in this subsection contained shall be construed to prevent the sale, assignment, lease or other disposition by any corporation, person or public utility of a class designated in this subsection of property which is not necessary or useful in the performance of its duties to the public, and any sale of its property by such corporation, person or public utility shall be conclusively presumed to have been of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser of such property in good faith for value.

2. No such corporation shall directly or indirectly acquire the stock or bonds of any other corporation incorporated for, or engaged in, the same or a similar business, or proposing to operate or operating under a franchise from the same or any other municipality; neither shall any street railroad corporation acquire the stock or bonds of any electrical corporation, unless, in either case, authorized so to do by the commission. Save where stock shall be transferred or held for the purpose of collateral security, no stock corporation of any description, domestic or foreign, other than a gas corporation, electrical corporation, water corporation, sewer corporation or street railroad corporation, shall, without the consent of the commission, purchase or acquire, take or hold, more than ten percent of the total capital stock issued by any gas corporation, electrical corporation, water corporation or sewer

corporation organized or existing under or by virtue of the laws of this state, except that a corporation now lawfully holding a majority of the capital stock of any gas corporation, electrical corporation, water corporation or sewer corporation may, with the consent of the commission, acquire and hold the remainder of the capital stock of such gas corporation, electrical corporation, water corporation or sewer corporation, or any portion thereof.

3. Nothing herein contained shall be construed to prevent the holding of stock heretofore lawfully acquired, or to prevent upon the surrender or exchange of said stock pursuant to a reorganization plan, the purchase, acquisition, taking or holding of a proportionate amount of stock of any new corporation organized to take over, at foreclosure or other sale, the property of any corporation whose stock has been thus surrendered or exchanged. Every contract, assignment, transfer or agreement for transfer of any stock by or through any person or corporation to any corporation in violation of any provision of this chapter shall be void and of no effect, and no such transfer or assignment shall be made upon the books of any such gas corporation, electrical corporation, water corporation or sewer corporation or shall be recognized as effective for any purpose.

91.090. The city council of any city of the third or fourth class in this state, or any city operating under a special charter, having three thousand inhabitants or more and less than one hundred and fifty thousand inhabitants shall have the power to erect, maintain and operate waterworks or to acquire waterworks by purchase as herein provided, and to operate and maintain the same and supply the inhabitants thereof with water and to charge therefor reasonable rates as herein provided.

91.120. 1. The city shall have the right to acquire by purchase any waterworks system in operation in such city at its fair and equitable value, to be agreed upon by the city and the person, firm or corporation owning the waterworks system, and whenever a proposition is made in writing to the city by the person, firm or corporation owning such plant to sell to the city under sections 91.090 to 91.300 its waterworks system at a price that the city council deems fair and equitable, the council or other proper authorities shall, by ordinance, submit the question to the voters of the city.

2. The question shall be submitted in substantially the following form:

Shall the city acquire the waterworks system and property and issue bonds therefor, which shall be a first lien on the waterworks system and property, but not a general or personal obligation of the city?

3. And if a majority of the voters of the city voting on the question shall vote "Yes", then such city shall acquire said property at the price and on the terms named in the question.

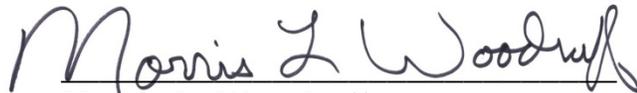
STATE OF MISSOURI

OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 7th day of February 2018.




Morris L. Woodruff
Secretary

MISSOURI PUBLIC SERVICE COMMISSION

February 7, 2018

File/Case No. WM-2017-0342

**Missouri Public Service
Commission**

Staff Counsel Department
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
staffcounsel@psc.mo.gov

Office of the Public Counsel

Hampton Williams
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102
opc@ded.mo.gov

City of Ozark, Missouri

Amanda R Callaway
201-B E. Brick Street
P.O. Box 295
Ozark, MO 65721
acallaway@ozarkmissouri.org

City of Ozark, Missouri

David V Collignon
P.O. Box 295
Ozark, MO 65721-0295
acallaway@ozarkmissouri.org

**Missouri Public Service
Commission**

Marcella Forck
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
marcella.forck@psc.mo.gov

**Public Funding Corporation of
the City of Ozark, MO, The**

Legal Department
205 North 1st Street
P.O. Box 295
Ozark, MO 65721
cityhall@ozarkmissouri.org

Enclosed find a certified copy of an Order or Notice issued in the above-referenced matter(s).

Sincerely,



**Morris L. Woodruff
Secretary**

Recipients listed above with a valid e-mail address will receive electronic service. Recipients without a valid e-mail address will receive paper service.